

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 14 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendments of Parts 2 and 90 of the)
Commission's Rules to Provide for the)
Use of 200 Channels Outside the Designated)
Filing Areas in the 896-901/935-940 MHz)
Bands Allotted to the Specialized Mobile)
Radio Pool)

PR Docket No. 89-558

DOCKET FILE COPY ORIGINAL

Implementation of Section 309(j) of the)
Communications Act - Competitive Bidding)

PP Docket No. 93-253

Implementation of Sections 3(n) and 322)
of the Communications Act)

GN Docket No. 93-252

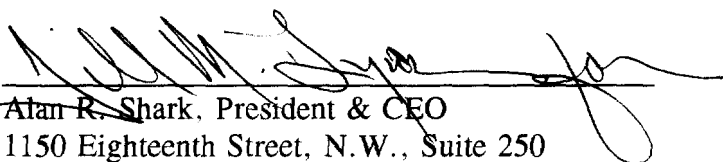
To: The Commission

COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.

RESPECTFULLY SUBMITTED,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

By:


Alan R. Shark, President & CEO
1150 Eighteenth Street, N.W., Suite 250
Washington, D.C. 20036
(202) 331-7773

Of Counsel:
Elizabeth R. Sachs, Esq.
Terry J. Romine, Esq.
Lukas McGowan Nace & Gutierrez, Chartered
1111 Nineteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500

Date: July 14, 1995

No. of Copies rec'd
List A B C D E

024

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendments of Parts 2 and 90 of the)	
Commission's Rules to Provide for the)	PR Docket No. 89-553
Use of 200 Channels Outside the Designated)	
Filing Areas in the 896-901/935-940 MHz)	
Bands Allotted to the Specialized Mobile)	
Radio Pool)	DOCKET FILE COPY ORIGINAL
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act - Competitive Bidding)	
)	
Implementation of Sections 3(n) and 322)	GN Docket No. 93-252
of the Communications Act)	

To: The Commission

**COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), pursuant to a Request for Comments in 900 MHz SMR Proceeding,^{1/} respectfully submits its Comments on the appropriate measures to address the issues raised by the decision in Adarand Constructors, Inc. v. Pena^{2/} as it may relate to the proposed treatment of designated entities in the 900 MHz Specialized Mobile Radio ("SMR") auction as proposed in the above-

¹ Request for Comments in 900 MHz SMR Proceeding (DA 95-1479) released June 30, 1995 (Wireless Telecommunications Bureau) ("Request").

² 63 U.S.L.W. 4523 (U.S. June 12, 1995) ("Adarand")

styled proceeding. AMTA believes that the proposals in the Second Further Notice of Proposed Rule Making in this proceeding^{3/} as they relate to treatment of designated entities provide appropriate measures to meet the mandates of Section 309(j) and are consistent with and do not violate the principles set forth in the Adarand decision.

I. Introduction

AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry.^{4/} The Association's members include trunked and conventional 800 MHz and 900 MHz SMR operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country. The systems they operate are classified by the FCC as Private Mobile Radio Service ("PMRS") or Commercial Mobile Radio Service ("CMRS"), the latter being considered a sub-category of common carrier service.^{5/} Because these members will be affected by the competitive

³ Second Report and Order and Second Further Notice of Proposed Rule Making, PR Docket No. 89-553, 60 FR 21987 (May 4, 1995) ("Second Further Notice")

⁴ These entities had been classified as private carriers prior to the 1193 amendments to the Communications Act. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002 (b), 107 Stat. 312, 392 ("Budget Act").

⁵ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1418 (1994) ("CMRS 2nd R&O"), Erratum, 9 FCC Rcd 2156 (1994); Third Report and Order, 9 FCC Rcd 7988 (1994) ("CMRS

bidding procedures ultimately adopted in this proceeding, AMTA has filed Comments and Reply Comments in response to in the Second Further Notice.

II. Discussion

In the Second Further Notice, the Commission proposed certain financial preferences only for designated entities which qualify as a small business. No distinct preferences were proposed for entities which would be considered minority-owned and/or woman-owned businesses. AMTA believes that this race and gender-neutral provision meets the mandates of Section 309(j)(6)(B) of the Communications Act of 1934, as amended (the "Act"),^{6/} i.e. promoting economic opportunity and competition by the dissemination of licenses among a wide variety of applicants, and would withstand judicial scrutiny, should it be challenged. No additional financial preferences need be provided to either minority and/or woman-owned businesses. Neither the prior history of licensing in the 900 MHz SMR industry nor the availability of financing has posed a barrier to entry by such groups into this specific telecommunications industry.

The decision in Adarand for the first time imposes a strict scrutiny standard of review on federal affirmative action programs, such as providing preferences in competitive bidding rules for minority-owned businesses. For a governmental affirmative action program to withstand strict scrutiny, the government interest underlying the affirmative action measure must be

3rd R&O"), Erratum, 9 FCC Rcd ____ (1994).

⁶ 47 U.S.C. § 309 (j)(6)(B).

"compelling" and the measure must be "narrowly tailored" to serve that interest. The government must have sufficient evidence of discrimination to support its decision to take remedial actions. Neither historical societal discrimination nor the underrepresentation of minorities in a particular sector or industry when compared to a general population statistic is considered to be a "compelling" interest.^{7/}

The record in the Second Further Notice does not provide any evidence of a pattern of discrimination in the 900 MHz SMR industry. The manner in which 900 MHz SMR licenses were initially issued promoted diversification. The applications for 900 MHz SMR spectrum consisted of postcard-type entries. There were no filing fees. The licenses were awarded by random selection through lottery.

Further, vendor financing was readily available which reduced the amount of capital that was necessary to be obtained from financial sources. There also is a general consensus that the acquisition of a 900 MHz SMR license and the construction of the underlying system will not be as capital intensive as other broadband telecommunications services. The difficulties in obtaining financing which have provided a basis for race and gender preferences in other more capital intensive telecommunications services, therefore, would not be as applicable to the 900 MHz SMR spectrum.

Accordingly, should the Commission adopt race or gender preferences

⁷ See, City of Richmond V. J.A. Croson Co., 488 U.S. 469 (1989).

in the competitive bidding design for 900 MHz SMR spectrum, it may be unable to provide a "compelling" interest should the Commission's rules be subjected to judicial strict scrutiny review and the rules may not withstand such judicial review.

The other prong of the strict scrutiny test is that the actions used to remedy past discriminations must be narrowly tailored. One factor which is used to determine whether an action has been "narrowly tailored" is the government's consideration of race-neutral alternative before resorting to race-conscious action. The Commission has proposed such an alternative already, and should adopt it because the Commission's objective to promote diversification in 900 MHz SMR licensing may be met without minority or women preferences. For the most part, minority and/or women-owned business will be either newly formed businesses for the purpose of entering the 900 MHz SMR business or small entrepreneurial businesses. A carefully crafted definition of a small business for preference purposes will include those minority/women-owned business which otherwise might not be able to participate in the 900 MHz SMR auction.^{8/} The Commission, therefore, is able

⁸ The Commission must recognize that not all minority and women-owned businesses need preferences. There are a number of successful minority and women-owned businesses which have financial, technical and management resources to compete for spectrum in the 900 MHz SMR service, should they chose to do so. For the Commission to structure its competitive bidding rules so broadly so that such successful entrepreneurs reap the benefits of financial preferences would not appear to meet the objectives of the Act.

able to narrowly tailor its rules in adopting race-neutral and gender-neutral preferences without subjecting itself to challenge of its adopted preferences for the 900 MHz SMR auction.

The threat of judicial challenge to the 900 MHz SMR rules is of particular concern to the Association. The 900 MHz SMR industry has been "frozen" in place for more than seven years awaiting the Commission to continue licensing of this spectrum. Further delays could have serious economic impact on the incumbent licensee and the viability of the 900 MHz SMR industry. The Commission also may find that fewer entities may participate in the 900 MHz SMR auctions because of such a judicial threat which may delay the auction or the ultimate grant of a license. A lack of participation could undermine the objectives of diversification in licensing.

III. Conclusion

AMTA, therefore, reiterates its support of the Commission's proposal to provide preferences to only those designated entities which meet the criteria of a "small business." Further delay by the Commission in adopting competitive bidding rules and any threat of judicial action to such rules is not in the public interest and may reduce competition in the commercial mobile radio services. The proposed preferences for small businesses is compliant with both the congressional mandate to promote diversification in licensing

of financial preferences would not appear to meet the objectives of the Act.

spectrum and does not violate the principals of strict scrutiny standard imposed by Adarand on federal affirmative action programs. AMTA encourages the Commission to expeditiously take action in this proceeding and schedule the 900 MHz SMR auction to begin in November 1995, as has been previously announced.

CERTIFICATE OF SERVICE

I, Rhonda Evans, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 14th day of July, 1995, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing Comments, to the following:


- * Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554
- * Commissioner James H. Quello
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554
- * Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, NW, Room 826
Washington, DC 20554
- * Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554
- * Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554
- * Regina Keeney, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554
- * Ralph Haller, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554

- * Gerald Vaughan, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20554
- * Rosalind K. Allen, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554
- * David Furth, Deputy Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20554
- * Robert McNamara, Chief
Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW, Room 5322
Washington, DC 20554
- * John Cimko, Jr., Chief
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street, NW, Room 644
Washington, DC 20554
- * William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, NW, Room 614
Washington, DC 20554

Michael Hirsch
Vice President
External Affairs
Geotek Communications, Inc.
1200 19th Street, NW, #607
Washington, DC 20036

Henry Goldberg
Jonathan L. Wiener
Daniel S. Goldhberg
Goldberg, Godles, Wiener & Wright
1229 19th Street, NW
Washington, DC 20036
Attorney for RAM Mobile Data USA Limited Partnership

Mary Brooner, Esq.
Motorola, Inc.
1350 Eye Street, NW, Suite 400
Washington, DC 20005


Rhonda Evans

* Via Hand-Delivery